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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/563,328	12/30/2005	Andreas Rochling	2400.012000/VLC/CMB	6764

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EXAMINER

HOLT, ANDRIAE M

ART UNIT

PAPER NUMBER

1616

MAIL DATE

DELIVERY MODE

08/06/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/563,328

Applicant(s)

ROCHLING ET AL.

Examiner

Andriae M. Holt

Art Unit

1616

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 28 March 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4, 6, 9 and 10 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4, 6, 9 and 10 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-8508)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

This action is in response to the amendment filed March 28, 2008. Claims 1-4, 6, and 9-10 are pending in the application. Claims 5, 7 and 8 have been cancelled.

Rejections not reiterated from the previous Office Action are hereby withdrawn. The following rejections and/or objections are either reiterated or newly applied. They constitute the complete set of rejections presently being applied to the instant application.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1, 4 and 9-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Warrington (WO 03/037084) in view of Dutzmann et al. Publication (2002).

Applicant's Invention

Applicant claims an agrochemical formulation comprising Fluoxastrobin, gamma-butyrolactone, an emulsion stabilizer and/or a crystallization inhibitor. Applicant further claims the formulation can further comprise prothioconazole. Applicant claims a method of contacting the formulation in the habitat of the plants to be treated and/or protected.

***Determination of the scope of the content of the prior art
(MPEP 2141.01)***

Warrington teaches a concentrated pesticidal solution that is comprised of one or more water-insoluble pesticides and lignin dissolved in a water miscible, polar solvent (Abstract). Warrington teaches the pesticides include herbicides, insecticides and fungicides (page 2, line 12). Warrington teaches that particularly useful fungicides include triazole and strobilurin fungicides (page 2, lines 19-22). Warrington further teaches of particular interest are azoxystrobin, picoxystrobin, tebuconazole, cyproconazole and picoxystrobin in admixture with cyproconazole (page 2, lines 22-25). Warrington teaches the preferred solvents include γ -butyrolactone (page 3, lines 8-10) (claims 1 and 9, γ -butyrolactone, instant invention). Warrington teaches the solution concentration may include other additives such as polymer stabilizers or anti-settling agents to improve dilution (page 3, lines 14-15). Warrington further teaches examples of stabilizers include a xanthan gum (claim 1, emulsion stabilizer, instant invention). Warrington teaches the solution is prepared by dissolving the pesticide or pesticides,

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the lignin and a stabilizer or other additives in the polar solvent (page 4, lines 3-4) (claim 8, method of producing, instant invention). Warrington teaches the formulation provides a method of combating or controlling an agricultural pest which comprises applying to the pest or to the locus of the pest an effective amount of the dispersion (page 4, lines 13-16)(claim 10, method of protection, instant invention).

***Ascertainment of the difference between the prior art and the claims
(MPEP 2141.02)***

Warrington does not teach the strobilurin fungicide is fluoxastrobin or the addition of prothioconazole. It is for this reason the Dutzmann publication is added.

Dutzmann et al. teach that HEC5725 (fluoxastrobin) is a leaf-systemic broad-spectrum fungicide from the chemical class of dihydro-dioxazines used mainly in cereal crops. Dutzmann et al. teach the compound provides both a rapid initial effect and prolonged activity due to its protective and leaf systemic properties. Dutzmann et al. teach HEC5725 provides excellent control of Septoria leaf spot, Septoria leaf and glume blotch, rust and Helminthosporium diseases in wheat and barley. Dutzmann et al. teach that mixtures of HEC5725 with selected fungicides such as prothioconazole often result in an increased biological activity against these diseases. Dutzmann et al. further teach fluoxastrobin has a favorable regulatory profile (Abstract, STN).

***Finding a prima facie obviousness
Rationale and Motivation (MPEP 2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of invention to combine the teachings of Warrington and Dutzmann et al. and use

fluoxastrobin as the preferred strobilurin fungicide. Warrington teaches that the compositions comprising a strobilurin fungicide with γ -butyrolactone, stabilizers and other additives provide storage stable soluble strobilurin compositions. One skilled in the art would have been motivated to use fluoxastrobin as the strobilurin compound because Dutzmann et al. teach fluoxastrobin provides both rapid initial effect and prolonged activity due to its protective and leaf systemic properties. Therefore, given the state of the art as evidenced by the teachings of the cited references, and absent any evidence to the contrary, there would have been a reasonable expectation of success in combining the teachings of the cited references to form a safe, storage stable strobilurin composition that provides both a rapid initial effect and prolonged protection against a wide variety of fungi.

It would have been obvious to one of ordinary skill in the art at the time of invention to combine the teachings of Warrington and Dutzmann et al. and use fluoxastrobin combined with prothioconazole in the formulation. Warrington teaches that the compositions comprising a strobilurin fungicide with γ -butyrolactone, stabilizers and other additives provide storage stable soluble strobilurin compositions. One skilled in the art would have been motivated to use fluoxastrobin combined with prothioconazole because Dutzmann et al. teach that mixtures of fluoxastrobin and prothioconazole result in an increased biological activity against a varied number of diseases. Therefore, given the state of the art as evidenced by the teachings of the cited references, and absent any evidence to the contrary, there would have been a reasonable expectation of success in combining the teachings of the cited references to form a safe, storage

stable strobilurin composition that provides increased biological activity against a varied number of diseases.

Claims 2-3 are rejected under 35 U.S.C. 103(a) as being unpatentable over Warrington (WO 03/037084) in view of Dutzmann et al. Publication (2002) in further view of Griffiths et al. (US 6,248,695).

Applicant's Invention

Applicant claims an agrochemical formulation comprising Fluoxastrobin, gamma-butyrolactone, an emulsion stabilizer and/or a crystallization inhibitor. Applicant further claims the formulation contains at least one ethylene diamine alkoxyate, particularly Synperonic T/304®.

***Determination of the scope of the content of the prior art
(MPEP 2141.01)***

The teachings of Warrington and Dutzmann et al. are incorporated herein by reference and are therefore applied in the instant rejection as discussed above.

***Ascertainment of the difference between the prior art and the claims
(MPEP 2141.02)***

Warrington does not teach the incorporation of an ethylene diamine alkoxyate, particularly, Synperonic T/304®. It is for this reason Griffiths et al. is joined.

Griffiths et al. teach an herbicide formulation comprising glyphosate herbicides and alkyldiamine tetraalkoxyate surfactants (col. 1, lines 5-8). Griffiths et al. teach that the most preferred surfactants are ethylene diamine alkoxyate (col. 3, lines 47-48)

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(claim 2, ethylene diamine alkoxyate, instant invention). Griffiths et al. further teach that suitable alkyl diamine alkoxyates include Synperonic T/304 (col. 3, lines 59-60) (claim 3, Synperonic T/304®, instant invention). Griffiths et al. teach that alkyldiamine tetraalkoxyate surfactants are very compatible with horticultural/industrial type formulations (col. 4, lines 25-30).

***Finding a prima facie obviousness
Rationale and Motivation (MPEP 2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of invention to combine the teachings of Warrington, Dutzmann et al. and Griffiths et al. and use ethylene diamine alkoxyate as a surfactant. Warrington teaches that the compositions comprising a strobilurin fungicide with γ -butyrolactone, stabilizers and other additives provide storage stable soluble strobilurin compositions. One skilled in the art would have been motivated to use ethylene diamine alkoxyate as the surfactant as Griffiths et al. teach the surfactants provide enhanced activity and are compatible with horticultural/industrial type formulations. Thus, given the state of the art as evidenced by the teachings of the cited references, and absent any evidence to the contrary, there would have been a reasonable expectation of success in combining the teachings of the cited references to form a safe, storage stable strobilurin composition that has enhanced biological activity against a wide variety of fungi.

Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over Warrington (WO 03/037084) in view of Dutzmann et al. Publication (2002) in further view of Cotter et al. (US 6,277,856).

Applicant's Invention

Applicant claims an agrochemical formulation comprising Fluoxastrobin, gamma-butyrolactone, an emulsion stabilizer and/or a crystallization inhibitor. Applicant further claims the formulation further comprises Trifloxystrobin.

***Determination of the scope of the content of the prior art
(MPEP 2141.01)***

The teachings of Warrington and Dutzmann et al. are incorporated herein by reference and are therefore applied in the instant rejection as discussed above.

***Ascertainment of the difference between the prior art and the claims
(MPEP 2141.02)***

Warrington does not teach the addition of Trifloxystrobin to the formulation. It is for this reason Cotter et al. is joined.

Cotter et al. teach a fungicidal composition comprising an acceptable carrier and/or surface active agent and synergistically effective amounts of at least one compound of formula (I) and at least one fungicidal active ingredient selected from compounds (A), (B) a fungicidal triazole derivative and (C) a synthetic strobilurin derivative (col. 2, lines 19-33). Cotter et al. teach solvents used in the composition may be γ -butyrolactone (col. 5, lines 56-63). Cotter et al. teach in examples 27-31, columns

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20-22, the fungicidal efficacy of the mixture of (s)-Azolopyrimidine C in admixture with Trifloxystrobin (claim 6, Trifloxystrobin, instant invention).

Finding a prima facie obviousness
Rationale and Motivation (MPEP 2142-2143)

It would have been obvious to one of ordinary skill in the art at the time of invention to combine the teachings of Warrington, Dutzmann et al., and Cotter et al. and use fluoxastrobin combined with trifloxystrobin in the formulation. Warrington teaches that the compositions comprising a strobilurin fungicide with γ -butyrolactone, stabilizers and other additives provide storage stable soluble strobilurin compositions. In view of *In re Kerkhoven*, 205 USPQ 1069 (C.C.P.A. 1980), it is *prima facie* obvious to combine two or more compositions each of which is taught by prior art to be useful for the same purpose in order to form a third composition that is to be used for the very same purpose. The idea of combining them flows logically from their having been individually taught in prior art, thus claims that requires no more than mixing together two or three conventional fungicides set forth *prima facie* obvious subject matter.

Therefore, one skilled in the art would have been motivated to use fluoxastrobin combined with trifloxystrobin as Cotter et al. teach that mixtures of trifloxystrobin with other fungicidal compositions provide synergistic control of the growth of phytopathogenic fungi. Given the state of the art as evidenced by the teachings of the cited references, and absent any evidence to the contrary, there would have been a reasonable expectation of success in combining the teachings of the cited references to

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form a safe, storage stable strobilurin composition that provides increased biological activity against a varied number of diseases.

None of the claims are allowed.

Conclusion

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Andriae M. Holt whose telephone number is 571-272-9328. The examiner can normally be reached on 9:00 am-5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Andriae M. Holt
Patent Examiner
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/Johann R. Richter/

Supervisory Patent Examiner, Art Unit 1616